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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Opinion No. 16-IB15

June 10, 2016

VIA EMAIL AND U.S. MAIL

David L. Finger, Esq.
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Mr. David Grimaldi
grimaldireig@gmail.com

Re: FOIA Petition Concerning New Castle County Dated November 30, 2015

Dear Mr. Grimaldi:

On November 30, 2015 you submitted email correspondence to this office alleging certain violations of the public records provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"), by New Castle County ("County") in connection with your November 1, 2015 request for "[a]ll audio recordings of the New Castle County benefits committee during the period of 10/1/2014 to present." On December 1, 2015, we informed you that we were treating your correspondence as a request for a determination pursuant to 29 *Del. C.* § 10005(e) ("Petition"). Here, we find that the County violated FOIA by failing to properly advise you – within 15 business days of your FOIA request – of why it could not fulfill your FOIA request within 15 business days and by failing to provide a good-faith estimate of how much additional time it required to fulfill your request. The appropriate remediation for such a violation would ordinarily be ordering the County to provide the required response or provide the requested documents. However, for the reasons set forth in this letter, neither course is appropriate under the circumstances of this case. Thus, we order no remediation for the County's FOIA violation.

I. BACKGROUND

On October 29, 2015, the County terminated your employment as the County's Chief Administrative Officer. On November 1, 2015, you submitted a FOIA request to the County Solicitor requesting "[a]ll audio recordings of the New Castle County benefits committee during the period of 10/1/2014 to present" ("Request").

By November 20, 2015, your attorney, David L. Finger, Esq., contacted the County to inform the County that he was representing you and instructed the County to direct all communications regarding you to him. On November 20, 2015, the County informed Mr. Finger that "it was reviewing the requested recordings and would provide a more complete response as soon as practical." By November 23, 2015, the 15th business day following your Request,¹ the County had neither fulfilled nor denied your Request. Nor had it cited a reason why your Request could not be fulfilled within 15 business days and provided a good-faith estimate of how much additional time it required to fulfill your Request.

On November 24, 2015, the 16th business day after your request, you sent a follow-up correspondence to the County Solicitor, copying the Deputy Attorney General who was then handling FOIA matters for this office ("FOIA Deputy"), stating that you had "yet to receive a response" to your Request. You stated that you were copying our FOIA Deputy "to make [this office] aware." You also expressed your belief that the County was in violation of its own FOIA policy, a portion of which you cited, and stated: "I'm hoping that I don't need to file a formal complaint with the Attorney General to fill this request for public records." On November 30, 2015, you forwarded your November 24, 2015 correspondence to our FOIA Deputy requesting that this office consider your correspondence "an official complaint against New Castle County" because you "still ha[d]n't received a response, or even an acknowledgment" of your Request.

Pursuant to our routine process in responding to petitions for determination under FOIA, we invited the County to submit a written response to your Petition. We received the County's response on December 7, 2015 ("Initial Response Letter"). In its Initial Response Letter, the County stated that "Mr. David L. Finger, Esq. . . . had contacted the County to state he was representing [you] and all communications should come through Mr. Finger." As a result, the County stated that it had informed Mr. Finger on November 20, 2015 that "it was reviewing the requested recordings and would provide a more complete response as soon as practical." The County also stated: "[T]he [County's] Office of Law is reviewing the audio tapes to determine whether any information not subject to FOIA exists on the audio tapes and, if necessary, the proper method of redacting such information."

On or about December 10, 2015, you filed a complaint ("Complaint") in the Superior Court of the State of Delaware ("Superior Court") naming Thomas Gordon and the County as defendants. In your Complaint, you allege that you were terminated by the County in violation of Division 2.03.3000 of the New Castle County Code (Count I) and 29 *Del. C.* § 5115 (Count II) for reporting the acts and omissions by County employee Cheryl McDonough and other County employees who

¹ We note that November 11, 2015 was a legal holiday.

you allege violated Sections 2.03.103(B)(1) and 2.03.104(A) of the New Castle County Code.² By way of example, you specifically allege that Ms. McDonough violated Sections 2.03.103(B)(1) and 2.03.104(A) at a benefits committee meeting in connection with the award of a contract for insurance consulting services.³ You also note in your Complaint that you made a formal request under Delaware’s FOIA for audiotapes of those meetings and that the County had not produced them to date.⁴

On January 7, 2016, we received email correspondence from you, wherein you stated that you still had not received a response to your Request. On January 8, 2016, we sent a letter to the County requesting that the County provide an update regarding the status of its review. We received a letter from the County on January 19, 2016. In its response, the County stated that its review of the recordings remained ongoing. The County also referenced the ongoing litigation and stated that the audio recordings “may be ‘records pertaining to pending or potential litigation which are not records of any court.’” Finally, the County noted that segments of the meetings had been posted on the Internet platform *SoundCloud* and, as a result, “the County [wa]s determining whether the audio recordings [we]re subject to FOIA and whether any violation of Delaware law or County Code ha[d] occurred.”

On February 10, 2016, we received additional email correspondence from you stating that you still had not received a response to your Request. On February 29, 2016, we sent a letter to the County requesting a status update. We received a letter from the County on March 22, 2016, wherein the County stated that the records are “records pertaining to pending or potential litigation.” The County also stated:

Grimaldi’s FOIA request for the Benefits Committee audiotapes obviously pertains to his allegations in the Complaint concerning the current Insurance and Loss Control Manager. Moreover, the temporal proximity between this and Grimaldi’s other FOIA requests and his litigation filing strongly suggest that the only purpose in making this FOIA request was to obtain information to use in the pending litigation.

Finally, the County alleged that you and/or your associates had posted segments of the meeting on *SoundCloud* and your Petition is “an attempt to obscure” you or your associates’ prior removal of the tapes.⁵

On April 12, 2016, we received email correspondence from you, wherein you stated that the County initially claimed that it was actively reviewing the audiotapes before it “decided to change legal position and block the FOIA production.” You also stated that you are “not asking

² Complaint at ¶¶ 36-45.

³ *Id.* at ¶ 24a.

⁴ *Id.*

⁵ This allegation is beyond the scope of FOIA and, as such, will not be considered here.

for confidential or investigative files, as referenced in their reply” but are “simply asking for audio tapes of public, noticed meetings.”

II. APPLICABLE LAW

Pursuant to 29 *Del. C.* § 10003(h)(1), a “public body shall respond to a FOIA request as soon as possible, but in any event within 15 business days after the receipt thereof, either by providing access to the requested records, denying access to the records or parts of them, or by advising that additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived.” Moreover, “[i]f access cannot be provided within 15 business days, the public body shall cite 1 of the reasons . . . why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request.”⁶

Pursuant to 29 *Del. C.* § 10003(a), “[a]ll public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate body,” and “[r]easonable access to and reasonable facilities for copying of these records shall not be denied to any citizen.” “Public record” is defined as “information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes”⁷ However, among the information that FOIA exempts from the definition of “public records” are “[a]ny records pertaining to pending or potential litigation which are not records of any court.”⁸

III. DISCUSSION

The County Violated FOIA by Failing to Properly Respond to Your Request for Records Within 15 Business Days

As noted above, a public body is required to respond to a request for records within 15 business days of receipt thereof by either “providing access to the requested records, denying access to the records or parts of them, or by advising that additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived.”⁹ Moreover, “[i]f access cannot be provided within 15 business days, the public body shall cite 1 of the reasons . . . why more time is needed and *provide a good-faith estimate of how much additional time is required* to fulfill the request.”¹⁰

⁶ *Id.*

⁷ 29 *Del. C.* § 10002(j).

⁸ 29 *Del. C.* § 10002(l)(9).

⁹ 29 *Del. C.* § 10003(h)(1).

¹⁰ *Id.* (emphasis added).

In this case, the County indicated that it informed your attorney on November 20, 2015 that “it was reviewing the requested recordings and would provide a more complete response as soon as practical.” By November 23rd – the 15th business day after its receipt of the Request – the County had neither cited a permissible reason why additional time was needed to fulfill your Request nor provided a good-faith estimate of how much additional time it required. We find that the County’s failure to comply 29 *Del. C.* § 10003(h)(1) violated FOIA.

No Remediation Will Be Ordered Because the Requested Records Are Not Public Records

We do not order remediation for the County’s FOIA violation because there is none we believe to be appropriate under the circumstances of this case.¹¹

As noted above, Delaware’s FOIA exempts from the definition of “public record” “[a]ny records pertaining to pending or potential litigation which are not records of any court.”¹² This office has repeatedly made clear that the purpose of the exemption is to maintain a level playing field, as “Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court’s rules of procedure.”¹³ Indeed, the exemption applies where litigators or litigants are seeking information that might help them in court.¹⁴ As a result, the applicability of the exemption “turns on the identity of the requestor and the purpose of the request.”¹⁵ While the requesting party’s motives are generally irrelevant to a FOIA analysis, “this is not so when the requesting party seeks information from a public body to advance that party’s private interest in litigation.”¹⁶

Ordinarily, where there was no pending litigation at the time of the Request, as here, we apply a two-step test to determine whether the “potential litigation” exception justifies a refusal to

¹¹ See, e.g., *Del. Op. Att’y Gen.* 15-IB06 (Aug. 19, 2015) (“[O]ur office has not recommended remediation where the underlying issue leading up to the FOIA complaint is resolved by the parties or other intervening events, or the FOIA violations were harmless and resulted in no prejudice to public rights.”).

¹² 29 *Del. C.* § 10002(l)(9).

¹³ *Op. Att’y Gen.* 06-IB21 (Oct. 23, 2006) (citing *Mell v. New Castle County*, 835 A.2d 141, 147 (Del. Super. 2003)).

¹⁴ *Office of the Public Defender v. Delaware State Police*, 2003 WL 1769758, at *2 (Del. Super. March 31, 2003).

¹⁵ *Op. Att’y Gen.* 03-IB21 (Oct. 6, 2003).

¹⁶ *American Civil Liberties Union of Delaware v. Danberg*, 2007 WL 901592, at *4 (Del. Super. March 15, 2007) (citing *Mell*, 835 A.2d at 147).

provide records responsive to a FOIA request.¹⁷ In this case, however, you initiated litigation against the County on or about December 10, 2015, just ten days after filing your Petition with this office. We are satisfied that the requested records are not “public records” because they relate to pending litigation.

To be clear, “[f]or the pending litigation exemption to apply, there must be a sufficient nexus between the records requested under FOIA and the subject matter of the litigation.”¹⁸ Here, the nexus between the audio recordings of the benefits committee meetings and the subject matter of the litigation is clear. Your Complaint alleges, among other things, that you were terminated for reporting the acts and omissions by County employee Cheryl McDonough and other County employees. By way of example, you allege misconduct on the part of Ms. McDonough at a benefits committee meeting and specifically note that you made a formal request under Delaware’s FOIA for audiotapes of those meetings.¹⁹ The requested records are thus “records relating to pending litigation which are not records of any court.” As a result, they are not “public records” and are not subject to FOIA.²⁰ Moreover, there can be no doubt that the recordings are being sought for the purpose of advancing your case in litigation.²¹ As such, we do not believe it would be appropriate under the circumstances to order the County to provide the records as remediation for its FOIA violation, as doing so would undermine the important goals of the pending litigation exemption.

A Word About Disregarding Legal Obligations

The County, of course, is not the only public body that has failed to respond appropriately to a FOIA request on a timely basis. We have recently explained that we do not condone the

¹⁷ See *Danberg*, 2007 WL 901592, at *4 (noting that the “litigation must be likely or reasonably foreseeable” and “there must be a ‘clear nexus’ between the requested documents and the subject matter of the litigation.”).

¹⁸ *Del. Op. Att’y Gen.* 03-IB21.

¹⁹ Complaint at ¶ 24a.

²⁰ See 29 *Del. C.* § 10002(l)(9) (indicating that such records “shall not be deemed public”); 29 *Del. C.* § 10003(d)(1) (noting that all records held by a “[state] agency are ‘public records’ to which the public should have access unless they fall within the scope of enumerated exemptions in § 10002”); 29 *Del. C.* § 10003(k) (permitting the removal of nonpublic records and noting that “all documents shall be considered public records unless subject to 1 of the exceptions set forth in § 10002”).

²¹ Cf. *Public Defender*, 2003 WL 1769758, at *2 (“There is no reason why the Public Defender needs the State Police materials except to the extent that they might help with the office’s clients . . . in court.”); *Koyste v. Delaware State Police*, 2001 WL 1198950, at *3 (Sept. 18, 2001) (“Although Plaintiff Koyste does not directly state why he wants the State Police materials, his purpose is clear: for use by the Federal Public Defender’s Office in the defense of its client . . .”).

practice.²² The General Assembly may wish to address the absence of a clear remedy for this practice.

IV. CONCLUSION

Based on the foregoing, we conclude that the County violated FOIA by failing to cite a reason why additional time was needed to fulfill your Request and by failing to provide you with a good-faith estimate of how much additional time it required. We nonetheless conclude that ordering the County to provide the requested records as remediation is inappropriate under the circumstances. Accordingly, we decline to order any remediation in connection with the County's FOIA violation. Because this matter is currently before the Superior Court, we assume that the recordings will be requested in discovery.

This letter is directed solely to the parties identified herein. It is based on the facts relevant to this matter and, as such, should not be cited as binding precedent by future parties.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

Approved:



Danielle Gibbs, Chief Deputy Attorney General

cc: Darryl Parson, County Solicitor
Jennifer R. Noel, Deputy Attorney General

²² See *Del. Op. Att'y Gen.* 16-IB12 (June 8, 2016).